STRONGEST CARD CHECK AND ANTI-SCAB IN CANADA

Fact Sheet: Changes to *The Labour Relations Act* resulting from Bill 37

Manitoba's New Card Check, Anti-Scab & Essential Services Law

Wab Kinew's NDP Government has passed historic labour legislation, which provides for single step, simple majority union certification (50% + 1 card check) and a ban on scab labour, while also requiring that narrowly defined 'essential services' continue to be delivered during a labour dispute and be performed by bargaining unit members (not by scabs).

This legislation represents a historic rebalancing of labour relations in our province after years of PC attacks on unions and workers. In delivering 50%+1 card check and anti-scab, the Kinew government has realized the dreams of generations of workers and labour activists. These first-in-Manitoba labour wins will make it easier for more workers to join unions, and ensure fairness when workers are standing up for their rights on the job.

Thanks to amendments made by the government to Bill 37 to strengthen anti-scab protection and streamline the process for determining essential services, Manitoba's card check and anti-scab law is now the strongest in the country.

The following provides an overview of the new measures in *The Labour Relations Act* related to card check, anti-scab and essential services.

Card Check

The Labour Relations Act has been amended to allow unions to be automatically certified as the bargaining agent for a unit where a simple majority (50% +1) of employees have signed union cards.

Applications for union certification based on 40% - 50% signed union cards will still require a secret ballot vote.

Where fewer than 40% of employees have signed union cards, applications for union certification will continue to be dismissed.

Ban on Scab Labour

The Labour Relations Act has been amended to prohibit employers and persons acting on behalf of an employer from using scabs during a strike or lockout to do:

1. work of an employee in the bargaining unit, or

2. work normally performed by a person who is performing work of an employee in the unit (i.e., if employers reassign Managers to do bargaining unit work during a strike or lockout, they can't then backfill those Manager positions by hiring more Managers).

Scabs are defined to include the following 3 categories:

1. *External replacement workers:*
   a. A person who ordinarily works at another workplace of the employer (not including managers and those working in a confidential labour relations capacity).
   b. A person transferred in (after notice to bargain was given).
   c. A person who is employed / supplied to the employer by another person (e.g., contractors).
   d. An employee of the workplace on strike or locked out who belongs to a different bargaining unit.

2. *Members of the bargaining unit*, in the case of a strike or lockout that is intended to involve the cessation of work by all employees in the bargaining unit.

3. *A person who is hired or engaged*[1] after notice to begin bargaining is given.

Any employer who violates the ban on using scab labour commits an *unfair labour practice.*

There are two exceptions to the ban on scab labour:

1. Threats, destruction, damage: employers can use replacement workers if
   (a) the services are used solely to deal with a situation that presents or could reasonably be expected to present:
   i) a threat to life, health and safety of any person;

1"Engaged" includes not only workers who are hired but also people who work outside of a traditional employment arrangement, such as students, interns, formal volunteers, etc.

ii) a threat of destruction or of serious damage to the employer's property or premises; or
iii) a threat of serious environmental damage; and

(b) the use of the services is necessary to deal with the situation because the employer is unable to do so by any other means.

For certainty: employers can only rely on this latter exception for the purposes specified above, and not for the purpose of continuing the supply of services, operation of facilities or production of goods.

2. Continuing services: Employers can continue using the services of a person outside the bargaining unit to perform the same or similar work of the bargaining unit to the same extent and in the same circumstance as they did before notice to bargain was given. (i.e., if sub-contracting or performance of bargaining unit work by non-unit members was taking place before notice to bargain was given, it can continue in the same way.)

Provision of Essential Services by Bargaining Unit Members

Manitoba's two previous Essential Services laws (*Essential Services Act – Health Care* and *Essential Service Act – Government & CFS*) have now been repealed. (These previous laws were determined to be unconstitutional, following the Supreme Court of Canada's ruling upholding the right to strike.[2])

The Labour Relations Act has been amended to require all unions and employers to determine if there are any essential services that need to be continued in the event of a strike or lockout and, if so, to negotiate an Essential Services Agreement (ESA) in advance. Where there are essential services that need to be continued, they must be performed by bargaining unit members (scabs cannot be used).

Essential services are defined as the supply of services, operation of facilities or production of goods to the extent necessary to:

a) prevent a threat to health, safety or welfare of residents of Manitoba;
b) maintain the administration of justice; and
c) prevent threat of serious environmental damage[3]

2 Saskatchewan Federation of Labour vs. Province of Saskatchewan (2015).
3 Essential services in the context of *The Labour Relations Act* are limited to these three categories only. This narrow legal definition is unrelated to the more expansive way in which people commonly talked about many services as being "essential" within the context of the COVID-19 pandemic.

By no later than 180 days before the expiration of a collective agreement, a union and employer must determine whether or not there are essential services that need to be maintained during a strike or lockout (and, therefore, whether an ESA is required or not) and file their determination with the Labour Board. If the parties are unable to agree on whether or not there are essential services requiring an ESA, either side may apply to the Labour Board for dispute resolution to obtain a determination.

The Labour Board has 30 days to determine the matter and make an order.[4]

The Labour Board is also authorized to issue guidelines at any time to parties about whether an ESA is required and what services do and do not fall under the narrow legal definition of essential services. (Unions are encouraged to engage the Labour Board if employers make false claims about needing to continue services outside the legal definition of essential services.)

Where it is determined that there are essential services that need to be continued and an Essential Services Agreement (ESA) is required, then the union and employer must negotiate an ESA and file a copy with the Labour Board by no later than 90 days before the expiration of a collective agreement,

If the parties are unable to conclude an ESA by the deadline, either one may apply to the Labour Board for dispute resolution to settle an ESA. By mutual agreement, the parties can use an arbitrator in place of the Labour Board to settle an ESA.

(Transitional provision: If parties to a collective agreement are already within the timelines specified for essential service determinations upon the law taking effect, either party may proceed immediately to make an application to the Labour Board for dispute resolution).

The Labour Board (or arbitrator) has 30 days to make a determination.[5]

A union and employer may still negotiate and file an ESA with the Labour Board after an application for dispute resolution is made but before the Board has made a determination.

ESAs must set out:

- the supply of services, operation of facilities or production of goods that are necessary to continue in the event of a labour disruption, and
- the manner and extent to which they need to be continued, including the number of bargaining unit members required.

4 A late order by the Board is still valid.

5 A late order by the Board is still valid.

In order for a strike or lockout to be initiated, one of the following must have occurred: either a determination must have been made and filed with the Labour Board concluding that there are no essential services that need to be continued in the event of strike or lockout (i.e., an ESA is not required), or, where there are essential services that need to be continued, an ESA must have been negotiated/settled and filed with the Labour Board.

Employers, unions and workers are required to comply with ESAs. Interference with the delivery of essential services is not permitted and constitutes an *unfair labour practice*.

Strikes and lockouts involving essential services require 3-day notice. A new notice period of 3 days is required if a strike or lockout does not occur as per the original notice.

If a union or employer believes that an ESA substantially interferes with meaningful collective bargaining, they may apply to the Labour Board to make such a determination. If the Labour Board agrees, the Board would initiate binding arbitration to resolve all matters in dispute. (Unions are encouraged to seek legal advice in making a case for substantial interference. Affiliates may contact the MFL for a handout summarizing current case law.)

The Minister may ask the Labour Board to review an ESA, and if the Board determines that an ESA is not sufficient to ensure the continuation of essential services, the Board may alter it. The Board may also review an ESA upon application by an employer or union, and similarly make alterations if, in the Board's judgement, the circumstances warrant it.

Where an arbitrator has been used by mutual agreement to settle an ESA, either party may apply to the arbitrator during a strike or lockout to have them settle any matter in dispute within 2 days (i.e., disputes over how an ESA is being implemented in practice). The Labour Board can act in situations not settled by arbitration.

Requirements related to essential services and ESAs do not apply to unions and employers where employees do not have the right to strike (e.g., teachers).

Notwithstanding the repeal of previous Essential Services legislation, any ESA entered into under either former Act (*Essential Services – Health Care* or *Essential Services – Government & CFS*) continues in force in accordance with its terms and can be filed with the Labour Board.

EM.cope342

USW9074:AR/AT